

Cub Branch Mining, Inc. and David Maynard. Case
9-CA-26445

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On March 20, 1990, Administrative Law Judge Joel A. Harmatz issued the attached decision.¹ The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cub Branch Mining, Inc., Kenova, West Virginia, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

¹ We grant the joint motion by the General Counsel and the Respondent to correct the judge's decision and to correct the transcript by changing various references from "Paint Branch" to "Frank Branch."

The judge inadvertently referred to the complaint's alleging a violation of Sec. 8(a)(3) of the Act; no violation of Sec. 8(a)(3) was alleged.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In adopting the judge's decision we find it unnecessary to rely on the judge's fns. 14 and 17 or on the judge's statement that the delivery of two bulldozers to Honey Branch mine before that site was closed indicated optimism on the Respondent's part regarding future production at Honey Branch.

As part of his recommended remedy, the judge required the Respondent to offer immediate reinstatement to all employees terminated at Honey Branch, discharging if necessary persons hired after April 19, 1989. He gave the Respondent the choice of either reopening Honey Branch or effecting reinstatement at other nearby mines. Noting the possibility that the Respondent, at the compliance stage, may show that Honey Branch would have closed at some time after April 19 for legitimate reasons, he provided that in that case backpay not be tolled to those discharged employees denied reinstatement during the interim, to any vacancies at the Respondent's other locations.

Consistent with this remedy, if there are not enough vacancies to effect full reinstatement at the Respondent's other nearby mines (i.e., even after discharging persons hired after April 19, 1989), and if reopening Honey Branch is shown to be unduly burdensome, the other discharged employees should remain on a preferential hiring list, to be reemployed as openings arise. *NLRB v. Fort Vancouver Plywood*, 604 F.2d 596, 601 (9th Cir. 1979). If the Respondent succeeds in showing that Honey Branch would have closed for legitimate reasons after April 19, backpay liability to those employees not yet reinstated will be tolled as of that later date, provided that the failure to reinstate them is legitimately grounded (e.g., insufficient vacancies).

Danon W. Harrison, Esq., for the General Counsel.
George J. Oliver, Esq. (Smith, Heenan & Althen), of Washington, D.C., for the Respondent.

300 NLRB No. 8

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Huntington, West Virginia, on September 19 and 20, 1989, on an unfair labor practice charge filed on May 17, 1989, and a complaint issued on July 12, 1989, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees because of their participation in a strike protected by Section 7 of the Act. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record, including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the surface mining of coal at various sites in the State of West Virginia. In the course of those operations, it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of West Virginia. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Preliminary Statement

The Respondent's employees have no history of collective bargaining and union representation is not a factor in this proceeding. At times material, the Respondent was engaged in the production of coal at various surface mines. In April 1989,¹ these operations were conducted at the instant Honey Branch site and, another, about 6 miles away, known as the Paint Branch site.²

The complaint focuses essentially on events of April 19. That morning, a work stoppage was engineered at Honey Branch by a single employee, Mike Messer. This step was taken to further Messer's protest of the Respondent's failure to grant him a higher rate of pay and promotion. In consequence, almost the entire day shift refused to report to work. That evening the strikers were informed that the mine would be closed permanently, and that they were terminated.

The General Counsel contends that the stoppage was protected by Section 7 of the Act, and that, therefore, the termination of the strikers violated Section 8(a)(1) of the Act. The Respondent argues that the strike was unprotected and that, in any event, the mine previously had been targeted for possible closure, and considering past losses, which were compounded by the strike, its decision to do so was legitimately based.

¹ Unless otherwise indicated all dates refer to 1989.

² The official transcript of proceeding is corrected insofar as it refers to the Paint Branch site, as "Frank Branch."

B. The Walkout and Its Origin

Michael Messer in April 1989 was employed as a laborer at the Honey Branch site. His rate was \$7.50 per hour. He claims that prior to the stoppage he had been offered the next vacancy on a grease truck at the operator's hourly rate of \$10.75. When the vacancy arose, it was on the second shift. On Saturday, April 15, Messer was told by Maintenance Foreman Tim Tackett that he could make the change, but would earn only the laborer's rate he was paid on day shift. Messer rejected this offer. Later that same week, Messer was assigned temporarily to operate a dozer, but again was denied the higher operator rate.

Messer, by April 18, was disturbed to the point of discussing his situation with coworkers, indicating to at least one, Paul Stacy, that he was planning on putting up a picket sign the next morning. On the morning of Wednesday, April 19, Messer arrived early, parking his truck along the private access to the Honey Branch site. He prepared a makeshift 8-by 9-inch sign, which stated "unfair labor." This, he affixed to the front window of his truck. As coworkers reported for work, they stopped and were told by Messer that he had "a work stoppage." He requested that they "honor my line." Coworker Paul Stacy was the first to arrive. He relates that he honored the picket line because he "figured one of these days I may need some help and I would ask him [Messer] for help." On the day shift, some 45 additional employees declined to cross. The payroll record covering that timeframe indicate that only two Raymond H. Maynard and Eulas Cantrell had earnings for that day.³

That morning, onsite managers, including Al Roe, the general superintendent, and Raymond E. Maynard, the day-shift foreman, soon learned that the picket line had been established by Messer, and was supported by coworkers to further his claim for an oiler job with "top pay." They reported this development to Larry Heatherman, the Respondent's personnel manager, and Chester Harris, its president.

On direction of Harris, during the course of the day, Roe, Raymond, and Heatherman, on three distinct occasions, approached the picket line urging the men to return to work, while inviting Messer to the office to discuss his grievance. Over their denials, all three were identified by witnesses for the General Counsel as having warned the men on different occasions that if they did not return to work, the operation would be shut down. In any event, management's efforts proved fruitless, as neither they, nor Messer would yield over the question of whether the dispute would be discussed in the office, as sought by management, or at the site of the picket line, and in the presence of coworkers, as Messer insisted.

Harris testified that when his staff reported back that the dispute had not been resolved, he reviewed financial record and decided about noon to close the mine. However, he contacted members of the board of directors, and admitted that it was not until 6 p.m. that local management was told. At that time, he instructed Roe to inform the men that the Honey Branch mine would be closed for economic reasons.

³The testimony offers various combinations of employees who crossed the picket line that day. There is some suggestion that G. J. Tackett, Vasco "Skip" Layne, and Mike Watts did so as well. The relevant payroll records at Honey Branch for the period ending April 22 fail to confirm that Tackett, Layne, or Watts had earnings on April 19. See R. Exh. 2. As for Cantrell and Raymond Maynard, both were terminated, but soon were rehired to perform reclamation work at Honey Branch. See R. Exh. 3(a).

Roe did so, and, later, all of the employees at this location were formally notified that the mine had closed, and they had been permanently laid off.⁴

C. The Prima Facie Case

The threshold issue is whether the work stoppage was protected. In this regard, the Respondent observes, quite correctly, that the underlying dispute was prompted by Messer's personal complaint which, if resolved favorably, would not impact directly on any other employees. It does not follow, however, that those who subsequently supported Messer by participating in the work stoppage were beyond statutory protection and hence fair game for retaliation. The Board has consistently held that concerted employee action, when invoked peaceably, to further an employment claim, such as a wrongful discharge, albeit personal in nature, remains within the protective mantle of Section 7 of the Act. See, e.g., *Buck Brown Contracting Co.*, 283 NLRB 488, 489, and cases cited at 513 (1987). In this case, the alleged discrimination was not aimed narrowly at the underlying grievance and its proponent,⁵ but broadly at the common cause manifested by the strikers, all whom enmeshed themselves in the quest to reverse management's judgment on a personnel matter. Once joined by coworkers, Messer's individual goals were adopted by the group. By this very process, management was put on notice, that its work force would not stand idly by in the face of unfair treatment. At that juncture, Messer's effort to vindicate his employment claim had been embraced by all as their rallying point. Thus, the effort qualified as protected concerted activity, and because the striker's endeavor was inoffensive to statutory policy, it fell within Section 7 guarantees, without inquiry as to whether the underlying grievance was meritorious, previously discussed,⁶ or beneficial to more than one employee.⁷

⁴About a week later, Messer received a layoff slip, stating: "Permanent lay-off, job shut down."

⁵Cf. *Gunnels Industrial Painters*, 197 NLRB 599, 600 (1972).

⁶The Respondent argues that "Messer's actions on April 18 fell far short of activity which sought 'to initiate or to induce or to prepare for group action.'" This test articulated in the line of cases highlighted by *Meyers Industries*, 268 NLRB 493 (1984), and 281 NLRB 882 (1986), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), is relevant when an employee, from beginning to end, steers an individual course under conditions which may or may not fall within Sec. 7. On the other hand, this standard is superfluous where retaliation addresses ordinary group action, itself concerted, i.e., a strike by numerous employees. The fact that the Board in *MCI Mining Corp.*, 283 NLRB 698 (1987), mentioned other factors in concluding that a strike was protected does not nullify the Congressional mandate in Sec. 13 that: "Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect limitations or qualifications on that right." Furthermore, aside from whether Messer's grievance was discussed with coworkers before April 19, which it was, the record attests to the fact that at least some who participated in the strike were aware of Messer's problem and supported his position. Cf. *Anco Insulations*, 247 NLRB 612 (1980). Indeed it is fair to assume that all willing to honor a picket line at the personal cost of lost wages, did so fully mindful of the underlying grievance and took this step because they supported it. Contrary to the Respondent's interpretation of *Meyers II* supra, Sec. 7 of the Act does not distinguish between the planning of, and the spontaneous, de facto, participation in group action. To rule that the former is protected but the latter is not to exalt "preparation" over "participation" and do violence to the ordinary meaning of "mutual aid and protection."

⁷The Respondent draws an analogy between the strikers in this case and sympathy strikers, whose "rights . . . are deemed to be those, and only those, with whom they sympathize." *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547 (1954). The Respondent offers that because Messer's complaint was personal and unprotected, the entire walkout assumed that character. In support, it is stated that:

On the issue of motive, ordinarily, any management action detrimental to participants in a protected work stoppage is sufficiently destructive of employee rights to be presumptively unlawful. As such, at a minimum, the employer is impelled to substantiate an overarching business justification. *NLRB v. Great Dane Trailers*, 388 US 26 (1967). In any event, even if the General Counsel were required to present specific evidence of animus, an obligation to be adjudged in light of *Wright Line*, 251 NLRB 1083 (1981), ample evidence exists here to substantiate the requisite nexus between the stoppage and the decision to close. Thus, it is apparent from uncontested evidence that Harris, on April 19, did not even begin to consider the possibility of closure and did not make any decision in that regard until provided reports that repeated appeals that the strikers return to work had proven fruitless. The inference that arises is more than sufficient to shift the onus to the Respondent to divorce the shutdown, and resultant discharges, from proscribed considerations.

D. The Defense

The Respondent claims that the Honey Branch employees were terminated in consequence of an economically oriented decision to shut down the mine. Though several profit and loss statements have been introduced, the documentation is inconclusive, with the bridge between them and a finding of business justification left to stand on Harris' parol testimony. He testified that during his 2 years at the helm, the Honey Branch mine was nonprofitable. He attributed this to inefficiencies stemming from Honey Branch's 14-1 ratio of overburden to extracted coal, contrasted with 7-1 at Paint Branch, a more profitable venture.

Specifically, Harris relates that mining operations began at Honey Branch in September 1987. After the July 1988 monthly cost statement reflected a loss of almost \$1 million that year,⁸ he conducted a meeting with supervisors on August 8, 1988. At that time, ideas were exchanged for increasing productivity and decreasing costs. The operation showed improvement through the end of the year and into January 1989. Between July and December, Honey Branch had turned a profit of almost \$100,000,⁹ with a profit of almost \$200,000 in the last quarter. This turnabout was not the only

factor suggesting that 1989 offered a year of great promise. First, January 1989 turned out to be a pretty good month. More importantly, in that month work was scheduled to begin under a new permit on a contiguous tract called Open Fork. Expectations there were positive due to core drilling ratios that were better than Honey Branch. According to Harris, it was for these reasons, and the fact that the Company was young, that no shutdown decision was made at the end of 1988.

By January 1989, coal removal within the original Honey Branch permit had ended. In February, Open Fork operations began. That month a loss was sustained primarily due to developmental costs in starting in a new area, such as the building of new roads. These preliminary operations foretold that March would bring the first full month of production. The quarterly profit-and-loss statement ending March 31 showed a budgeted output from the new Open Fork permit area of 37,500 tons, with only 23,555 having been actually produced. This translated into a net loss for the month of \$293,503, against a budgeted loss of \$2481.¹⁰

Harris attributed these losses to excessive overburden, explaining as follows:

[W]hen we went into Open Fork, we were mining two seams, we had Buffalo creek and we had a Colbert Seam. We had to move up off of our Buffalo Creek seam because it got so thin that we couldn't load this coal out, and we done covered our pit, it wouldn't be up there, so we moved upon our other seam, we had only one seam of coal to mine in there, and it was attributed to the ratios. It was the amount of over-burden versus tons of coal.

The poor productivity at Open Fork and resulting financial record, according to Harris, was not explainable in terms of wintry weather which he described as "good" for that time of year.¹¹

Harris states that cost and output figures are computerized on a daily basis and, from them, he learned in the month of March that profitability was on a slide. He testified that, at regular weekly cost meetings with supervisors, he reported that the recent improvement had been followed by a downward shift. To avert this trend, he initially reacted by, on March 22, promoting Alan Roe to the position of general superintendent. At the time, Roe was instructed to improve production any way he could by 5000 tons per month, allegedly giving him 30 days to show an improvement or the job would be shut down. At Harris' direction, Roe then conducted a series of meetings with supervisors, advising them that they would have to increase tonnage or the mine would close.¹² There is no evidence whatever that the need for greater productivity was ever communicated to rank-and-file employees, either in terms of possible shut down or as an abstraction.

Harris claims that after he met with Roe, he continued to monitor the Honey Branch operation, finding that production was not increasing and losses were mounting slightly more

It would be utterly illogical to conclude that a sympathy strike which compounds the "undue harassment" to an employer caused by a single employee's unprotected strike deserves any greater protection than the individual's unprotected protest itself.

The argument is not lacking in facial appeal. However, I am aware of no authority that treats employees who join a strike in support of a coworker's individual grievance against their common employer as "sympathy strikers." Nor do I perceive as to just how statutory interests would be furthered by cutting adrift those who would be engaged in this form of "mutual aid and protection." It is true that Messer's claim was personal and that favorable resolution would not benefit coworkers directly. It is also true that, if he lacked support from others, he could have been discharged with impunity. That, however, is not what occurred here. The Respondent's action cut down an entire work unit, whose pecuniary interest in the outcome may have been nil, but whose support of the job action was calculated to influence, in a positive way, their own work environment. Where, as here, there is no other hedge against unilateral management action, employees who resist, and thereby seek to influence decisions affecting their workplace, have more than a passing interest in resolution of an otherwise personal grievance. Thus, unlike sympathy strikers who support a cause which lacks relevance to their own work unit, the Respondent's employees sought to improve their own lot by participating in Messer's walkout. Hence, Sec. 7 of the Act removed coercion from among the options available to the Respondent for dealing with that endeavor.

⁸R. Exh. 1(a).

⁹R. Exh. 1(b).

¹⁰R. Exh. 1(c).

¹¹One can take notice of the fact that Appalachia under the best of weather conditions would alternate between freeze, thaw, and precipitation, to a point burdening the earth with heavy moisture well into the spring.

¹²Roe's testimony in this respect was corroborated by Foremen Ray Maynard, Glenn Messer, and Jimmy Lee Tackett.

than during the month of March. As matters turned out, the April profit and loss schedule showed a net 1088 of \$306,846.¹³

Harris learned of the April 19 incident when Alan Roe reported about 6:30 a.m. that “Mike Messer had a picket line at the foot of our Honey Branch operation,” and that it was “about a ten dollar and seventy-five . . . an hour [greaser] job.” Harris instructed Roe to go to the foot of the hill and see if he could resolve the problem. Roe later reported that he could not resolve the problem. Harris then contacted Heatherman, instructing him to take Messer’s brother, Glen Messer, and Raymond Maynard, to see if they could straighten the matter out. Later, Heatherman reported to Harris that he could not resolve it either. He, too, acknowledged that the dispute concerned Messer’s claim for the oiler’s job and the pay increase to the operator’s rate.

After Heatherman’s call, Harris assertedly reviewed our financial statements and conditions and concluded that losses already sustained would not be reversed “if we weren’t operating at all.” He therefore decided to close the Honey Branch site. He explained his decision as follows:

After talking to Mr. Heatherman I reviewed our financial statements and conditions that our Honey Branch operation was in, and after looking at—we were losing money operating, where were we going to be if we weren’t operating at all, if we were not—our fixed costs would still continue to go on. So, after looking at these reports, I decided to close the Honey Branch operation.

Conclusions

The law is not unsympathetic to the fact that business interests might be impaired by a protected work stoppage.¹⁴ To prevent losses, an employer that has not taken unlawful measures to provoke or prolong a strike is free to replace strikers permanently and continue operations. It also has a right to further its position in an underlying dispute by locking out the entire bargaining unit, while continuing to operate with temporary replacements. *Harter Equipment*, 280 NLRB 597 (1986). More relevant to the instant case, however, is precedent holding that, if the loss of manpower, itself, makes it economically infeasible to continue operations, the employer is privileged to close temporarily and shift operations to an unstuck facility. *Armored Transport*, 282 NLRB 850 fn. 2 (1987). The law tolerates these actions, even though detrimental to the strikers’ interests in order to accommodate the right of management to operate in the face of an economic strike. It does not, however, sanction deliberate repris-

als, which are punitive, and not shown to be supported by specific business exigency.

In this case, Harris’ own testimony demonstrates that the Honey Branch operation was closed only after it became clear that the underlying dispute would not be subject to immediate resolution. In the course of that day, Harris committed several members of his management team, including Mike Messer’s brother, to the task of resolving the issue, a step which reflected his expectation that their success would allow continued operation. Indeed, Harris confirms that he did not review the financial data, which allegedly prompted his decision,¹⁵ until noon, following Heatherman’s final report that no solution had been attained. Finally, it is not without significance, that of the 45 employees at that site, only 12 Honey Branch employees were subsequently reinstated by the Respondent. Of this group, only three were strikers—all rehired after the instant unfair labor practice charge was filed.¹⁶

In this light, it is concluded, at a minimum, that the decision to close *at that time* was produced solely by the emergence of the stoppage and the collapse of Respondent’s efforts to end it. In these circumstances, straight application of *Wright Line* would end the inquiry. For, the Respondent, quite plainly, has failed to demonstrate that “the same action would have taken place even in the absence of the protected conduct.” 251 NLRB at 1089. However, the Respondent relies on *Armored Transport*, supra, a case, which, inter alia, affords employers greater latitude in dealing with the consequences of a protected work stoppage. In that case, the shutdown was temporary, and coextensive with the period of the strike. It was deemed legitimate on a showing that customers were lost to a competitor because they could not be serviced from the strikebound facility, as the employer was unable to hire replacements and could not operate effectively with supervisors and nonstriking clericals. On these facts, the Board concluded that the Respondent had the “right to salvage what business it could given the sudden absence of drivers at the . . . struck facility.” Hence, it was stated that the action would have been taken “whether or not the absence of drivers necessary to operate that facility was due to their exercise of protected activity.” 282 NLRB 850 at fn. 2.

Consistent therewith, the Respondent would fulfill its *Wright Line* burden by demonstrating that it would have closed the mine on April 19 even if manpower had been unavailable for reasons unrelated to Section 7 activity. At the outset, however, it is important to note that this burden is more exacting than Respondent assumes. It is not met simply upon a showing that business losses stood at the foreground of its decision to close because of strike. As in *Armored Transport*, supra, the employer must justify the intrusion on statutory rights by demonstrating that it was a reasoned act of business judgment predicated on economic adversities created by the stoppage.

¹³R. Exh. I(d). This document obviously was not available on April 19.

¹⁴In assessing Harris’ testimony and the documents showing losses, concern arises out of the relationship between the Respondent and the sole purchaser of its output. Obviously the price per ton is the single-most important factor determining profitability. The question of whether the sums advanced to the Respondent was consistent with market prices and competitive was not litigated. However, the fashion in which Respondent’s coal is marketed creates skepticism in this connection. Thus, P & C Bituminous Coal of Nashville, Tennessee, purchases the entire output of Cub Branch at a fixed price \$14.50 per ton. Harris was formerly employed by that firm. Both P & C and Cub Branch are subsidiaries of Penn Holdings. In fact, Harris testified that on April 19, he contacted three members of the Respondent’s board of directors, who were affiliated with either P & C or Penn Holdings. Harris stated that he took this step because “They are the people that I answer to.”

¹⁵The Respondent’s computer capabilities permit access, on a current daily basis, to “daily cost reports.” See, e.g., R. Exh. 4. However, that of April 16, was the only financial document reviewed by Harris on April 19 before deciding to close down. He apparently did not have the presence of mind to make a hard copy of that data, as it was not presented in evidence.

¹⁶Thus, Jesse Stroud was hired to perform reclamation work at Honey Branch on June 14, Denzel Helton, was hired at Bull Branch on July 2, and Frank Perry was hired at Frank Branch on August 28.

This standard has not been met here. Simply put, the proof offered by the Respondent is too generalized to override discriminatory intent. It is possible to read this record and walk away with the understanding that the strike was neutral to Respondent's economic posture. Thus, there was no indication, and I am at a loss to understand the savings, long run or short term, that Harris expected to realize through his decision. Considering the labor intense nature of this business, it is fair to assume that these expenses would have been suspended during the walkout, and others would be born even with closure. Among the tradeoffs unmentioned by the defense was the matter of site development. These costs already had been sustained and, presumably, written off against past revenues. Harris does not disclose that he even considered the option of closure against this investment.

The absence of concrete explanation as to how the stoppage worsened the Respondent's cost position or made a turnaround less likely is complicated by the fact that Honey Branch, with the exception of a few months, had always operated with paper losses. Yet, as of April 19, having survived the worst conditions for stripping coal, there would seem to have been nothing but hope for this operation in the near future. Optimism on the Respondent's part is suggested by the fact that in April, within 2 weeks of the shutdown, two additional dozers were delivered to the Honey Branch site. Moreover, because the overburden problem was not evident in earlier engineering reports, one is given to wonder whether the Respondent did not at that time assume that the imbalance was limited to certain strata, and would ease somewhat as operations moved to unmined sectors of the new permit.¹⁷ Absolutely certain is the fact that overburden excesses would become more manageable and cut less sharply into productivity with the arrival of warmer, drier conditions.

In the final analysis, the defense has left reprisal as the dominant, credible explanation for its precipitant action. The closedown occurred in the midst of spring, on the heels of nonrecoverable site development costs and catchup expenditures to meet state demands in the area of reclamation.¹⁸ At the time, Open Fork startup was in its infancy and productivity on that permit had not reached optimum levels. Harris on April 19 exhibited a decisiveness which contrasts dramatically with his posture before the work stoppage. Thus, during the months producing the poorest conditions for surface mining, operations were permitted to run their course as he watched losses mount.

Against this background, I am unwilling to conclude that the Respondent has demonstrated to any persuasive extent

that closure of the Honey Branch mine was justified by any extraordinary economic crunch produced by the failure of its employees to report for work on April 19.¹⁹ Accordingly, by terminating the employees at that time, even if merely representative of accelerated action, the Respondent violated Section 8(a)(1) of the Act.²⁰

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by closing its Honey Branch mine, and terminating all employees at that location, in reprisal for a work stoppage protected by Section 7 of the Act.

3. The above unfair labor practice is an unfair labor practice having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

The Respondent, having terminated its Honey Branch mine, and discharged all employees because of a lawful, pro-

¹⁹ As previously indicated, on Harris' instruction, Roe, after March 22, held meetings with supervision, relaying that, "if we didn't get the production up by the end of the month that we would be more than like be gone and our jobs would be gone." Harris' direction to Roe, so early in the transition between sites and seams, is taken as an effort to prod supervision, and I did not believe that, at that juncture, he held any fixed intention to close if the productivity gains could not be achieved.

²⁰ No contention is made by the Respondent in this case that its action constituted a permanent partial closing, subject to the strictures of *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). There, the Court endorsed management's right to close its entire business, even if motivated solely by union considerations. At the same time, however, it held that "[a] partial closing is an unfair labor practice under section 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants and if the employer may reasonably have foreseen that such closing will likely have that effect." 380 U.S. at 275-276. Having failed to raise the issue, the record is not benefited by any objective showing that firm steps were taken to liquidate mineral interests held by the Respondent at the Honey branch site. *NLRB v. Fort Vancouver Plywood*, 604 F.2d 596 (9th Cir 1979). Not only are we left with Harris' characterizations that the step was permanent, but, without evidence that Respondent took measures which made that action irrevocable, there is only indefiniteness. Moreover, absent assertion of the *Darlington* defense, there was no need to challenge Harris testimony concerning permanence. In any event, considering the close proximity between Honey Branch and Paint Branch, the interchange of personnel between those locations, and the subsequent employment of Honey Branch discharges at Paint Branch, the Respondent could readily perceive that the closing would chill concerted activity among employees at this other operating site. *George Lithograph Co.*, 204 NLRB 431 (1973); *Bruce Duncan Co.*, 233 NLRB 1243 (1977). My finding in this respect is enforced by testimony by strikers Messer, Stacy, Stroud, Jack Maynard, and Jimmy Brown that, after their layoffs, they were told by Respondent's agents that they would not be employed at Paint Branch or any other of Respondent's locations. Similar statements were attributed to Roe by four nonstriking, currently employed Paint Branch employees (Jimmy Maynard, Lester Perry, William Caldwell, and George Howell). The Respondent's denials are rejected. I prefer the common pattern of conduct imputed to its officials by the General Counsel's evidence which included neutral, incumbent employees who had no apparent reason to fabricate testimony prejudicial to their immediate employer. Their credited accounts are indicative of a desire to seize on the closedown as a vehicle for chilling any similar uprising among employees elsewhere. Thus, if raised by the Respondent, it would be concluded that *Darlington*, supra, presents no impediment to the critical allegation in this case.

¹⁷ Prior to any extraction in the new permit area, core samples were taken. According to Harris, the resulting engineering report did not reflect the overburden ratios later discovered in actual mining operations. Yet, there is no suggestion that the Respondent followed up the preliminary core drilling data by seeking supplemental testing. This is explainable only in terms of the Respondent's own optimism that the shift in seams would produce lower ratios. Were this not the case, considering the daily losses incurred on this tract, I do not believe that the Respondent would gamble blindly into the future by proceeding without seeking scientific explanation of the breakdown in earlier core samplings and, more importantly, an assessment of the extent to which the adverse ratio affected the balance of the tract.

¹⁸ The General Counsel notes that accumulated reclamation demands acted on in early 1989 would have contributed to the adverse productivity picture at Honey Branch. Thus, it appears that, during earlier periods, reclamation efforts at that site had been deferred to an extent attracting the interest of regulators from the West Virginia Bureau of Natural Resources. Roe admitted that, prior to March 22, this work had backed up in substantial amount, and quite a bit remained to be done.

tected work stoppage, shall be ordered to offer them²¹ immediate reinstatement to their former positions, discharging if necessary persons hired after April 19, 1989. To the extent that vacancies fail to exist in sufficient number to support compliance with that obligation at the Respondent's remaining mines, a question arises as to whether the Respondent ought be directed to restore the status quo ante by reopening at Honey Branch. In that regard, since collective bargaining is not involved and there is no bargaining unit to be preserved, a remedy is to be fashioned which focuses exclusively on the interests of the discriminatees. Reestablishment is not necessarily essential to that process. Accordingly, Respondent will be afforded the option either of reopening Honey Branch or effectuating reinstatement at its other nearby mines.²² Whatever its choice, the Respondent shall make whole employees by payment to each a sum of money equal to the amount they would have earned as wages and other benefits from April 19 to the date of bona fide reinstatement.²³ Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as authorized in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, Cub Branch Mining, Inc., Kenova, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging employees from engaging in concerted activity for purposes of mutual aid or protection by closing a mine, laying off permanently, or in any other manner discriminating with respect to their wages, hours, or terms and conditions and tenure of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

²¹ Although the complaint identifies only the strikers as victims of discrimination, the Respondent's unlawful conduct equally affected all discharged at Honey Branch, and in order to effectuate statutory policy, all are encompassed by the recommended Order.

²² This is an effective alternative to a restoration order. In this case, losses sustained at Honey Branch give rise to the possibility that such relief would prove unduly harsh, and that to facilitate reinstatement on that basis "would endanger the Respondent's continued viability." *Hood Industries*, 273 NLRB 1587 (1985). At the very least, this matter was not litigated fully and, in my opinion, to entertain it at this stage of the case would prove unfair to the parties and incompatible with sound administrative practice. Both objections were sidestepped in *Hood Industries*, supra, in which this question was revisited in a separate proceeding, after liability was determined in the underlying unfair labor practice case. The same accommodation is made by providing the option to the Respondent.

²³ The proposed remedy is subject to certain issues most appropriately suited for litigation in a compliance proceeding. Thus, it is entirely possible that, at that time, the Respondent will be able to demonstrate that Honey Branch would have closed at some point in the future for legitimate reasons. Even if established, since the dischargees were entitled since April 19 to preferential hiring to vacancies at the Respondent's remaining locations, backpay will not be tolled as to those denied reinstatement, during the interim, to any such vacancies. Finally, any reinstatement offered at locations beyond reasonable commuting distances from Honey Branch and Paint Branch would not constitute a good-faith offer sufficient to toll backpay.

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to all employees discharged on April 19, 1989, discharging if necessary persons hired after that date and make them whole for losses sustained by reason of the discrimination against them, with interest, as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(c) Post at its facilities in Wayne and Lincoln Counties, West Virginia, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage you from engaging in concerted activity for purposes of mutual aid or protection by closing a mine, laying off permanently, or in any other manner discriminating with respect to your wages, hours, or terms and conditions and tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights set forth at the top of this notice.

WE WILL offer immediate reinstatement to all Honey Branch employees that we terminated on April 19, 1989, dis-

charging if necessary persons hired after that date and WE WILL make them whole for losses sustained by reason of the discrimination against them, with interest.

CUB BRANCH MINING, INC.